Supreme Court, U.S.
FILED
AUG 30 2004
OFFICE OF THE CLERK

No. 04-298

In The
Supreme Court of the United States

JESSICA WILLIAMS,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR A WRIT OF CERTIORARI

JOHN G. WATKINS, ESQ.
Counsel of Record
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006

ELLEN J. BEZIAN, ESQ.
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 471-7741

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Nevada Supreme Court's unforeseeable and retroactive judicial expansion of NRS 484.1245 can be used to deny Petitioner a new trial in violation of *Griffin v. United States*, infra, and *Leary v. United States,* infra.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	3
I. WILLIAMS WAS CONSTITUTIONALLY ENTITLED TO A NEW TRIAL UNDER *GRIFFIN V. UNITED STATES* AND *LEARY V. UNITED STATES*	3
A. Marijuana metabolite, carboxylic acid, is not listed in the state drug schedules and therefore, was not a prohibited substance as defined in NRS 484.1245 at the time of the alleged offense	3
CONCLUSION	7
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Angel McClary Raich, et al., Case No. 03-15481 (Docketed 4/20/04) 5

Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697 (1964) 3, 6

Crump v. Warden, Nevada State Prison, 113 Nev. 293, 934 P. 2d 247 (1997) 2

Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466 (1991) 2, 3, 4, 7

Klein v. Warden, Ely State Prison, 118 Nev. 305, 43 P. 3d 1029 (2002) 2

Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532 (1969) 2, 3, 4, 7

Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2369 (1986) 2

Pellegrini v. State, 117 Nev. 860, 34 P. 3d 519 (2001) 2

Reed v. Ross, 468 U.S. 1, 104 S. Ct. 2901 (1984) 2

Rogers v. Tennessee, 532 U.S. 451, 121 S. Ct. 1693 (2000) 3, 6

United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808 (1954) 3

CONSTITUTIONAL PROVISIONS

U.S. Constitution:
Fourteenth Amendment 1, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. § 1257 1

NRS 34.810 2

NRS 453A.010 5

NRS 453.166 ..... 5, 6

NRS 453.176 ..... 5, 6

NRS 484.1245 ..... *passim*

NRS 484.379(3) 5

NRS 484.3795 ..... 1, 5, 7

OPINIONS BELOW

The Decision of the Nevada Supreme Court that gives rise to the Petition is a published Opinion heard Before the Court En Banc. It is reprinted in the Appendix ("App.") at 1.

JURISDICTION

The instant Petition is filed under 28 U.S.C. § 1257 and the date of the Nevada Supreme Court decision to be reviewed was entered July 22, 2004.

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV, SECTION 1
OF THE UNITED STATES CONSTITUTION

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

The State prosecuted Petitioner Jessica Williams (Williams), under the newly enacted prohibited substance section of NRS 484.3795, on two alternative theories: marijuana (tetrahydrocannabinol) and marijuana metabolite (carboxylic acid). The Jury returned general verdicts of guilty thus it is unknown which theory was used as a basis

for the prohibited substance convictions.[1] After trial and appeal, Williams' counsel serendipitously learned from the prosecutor that carboxylic acid was not a prohibited substance as defined in NRS 484.1245 as no marijuana metabolite was listed in the drug schedules.

Counsel for Williams immediately filed for post conviction habeas corpus in district court seeking relief under *Griffin v. United States*, infra, and *Leary v. United States*, infra. The district judge found no procedural bar and heard the merits of Williams' petition, finding that carboxylic acid was not a prohibited substance under NRS 484.1245.[2] Relying on *Griffin v. United States*, infra, and *Leary v. United States*, infra, the district court ordered a new trial. *See* Order Granting Writ of Habeas Corpus (Post Conviction); Finding of Facts and Conclusions of Law. Appendix, p. 14. The State appealed. Based on an unforeseeable and retroactive judicial expansion of NRS 484.1245, the Nevada Supreme Court reversed. *See*

---

[1] Williams was also tried on the same 6 counts under an impairment theory and was *acquitted*.

[2] The Nevada Supreme Court declined to find good cause under NRS 34.810 for Williams not having raised the issue earlier even though Williams' issue was novel and of first impression. This is contrary to *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2369 (1986) and *Reed v. Ross*, 468 U.S. 1, 104 S. Ct. 2901 (1984), both cited to the state supreme court. However, Williams is entitled to relief under *Klein v. Warden, Ely State Prison*, 118 Nev. 305, 43 P. 3d 1029 (2002) and *Pellegrini v. State*, 117 Nev. 860, 34 P. 3d 519 (2001). Each holds that a fundamental miscarriage of justice negates the procedural bar of NRS 34.810. *See also, Crump v. Warden Nevada State Prison*, 113 Nev. 293, 934 P. 2d 247 (1997) (Ineffective assistance of counsel establishes both cause and prejudice under NRS 34.810.)

Opinion at Appendix, p. 12. Williams now seeks a *Writ of Certiorari*.

REASON FOR GRANTING THE WRIT

I.

WILLIAMS WAS CONSTITUTIONALLY ENTITLED TO A NEW TRIAL UNDER *GRIFFIN V. UNITED STATES* AND *LEARY V. UNITED STATES*.

A. Marijuana metabolite, carboxylic acid, is not listed in the state drug schedules and therefore, was not a prohibited substance as defined in NRS 484.1245 at the time of the alleged offense.

The Due Process Clause requires that a criminal statute give fair warning of the conduct which it prohibits. *See United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812 (1954). The Court in *Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693 (2000) said "Deprivation of the right to fair warning ... can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Bouie v. City of Columbia*, 378 U.S., at 352." *Id.* at 457. *Bouie* explained that in the latter situation, there is a potentially greater deprivation of the right to fair notice.

> When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in

> Lanzetta, or to "guess at [the statute's] meaning and differ as to its application," as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
>
> *Id.* at 352.

The Nevada Supreme Court's unforeseeable and retroactive judicial expansion of NRS 484.1245 deprived Williams of fair warning of the conduct which it prohibits. The plain reading of NRS 484.1245 shows that marijuana metabolite, carboxylic acid, was not a prohibited substance.[3]

The judicial expansion of NRS 484.1245 resulted in violations of *Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466 (1991) and *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532 (1969) which resulted in a 48 year prison sentence for a 20 year old female who drove ***unimpaired*** after using marijuana.[4] The State used an improper theory to convict Williams because marijuana metabolite,

---

[3] Tetrahydrocannabinol (THC) is the psycho active substance of marijuana. THC metabolizes into carboxylic acid, a non-active metabolite of marijuana. Carboxylic acid remains in the body long after the THC is gone. A plain reading of the NRS 484.1245 by a marijuana user would lead him to believe that with THC depleted from the body he would be free from prosecution even though the marijuana metabolite, carboxylic acid is present.

[4] Petitioner Jessica Williams, now 24 *years* old, has been jailed since March 19, 2000.

carboxylic acid, was not a prohibited substance under NRS 484.1245.[5]

Prohibited substance is defined in NRS 484.1245.[6]

> "Prohibited substance" means any of the following substances ***if*** the person who uses the substance has not been issued a valid prescription to use the substance and ***the substance is classified in schedule I or II pursuant to NRS 453.166 or 453.176 when it is used:***
>
> 1. Amphetamine.
> 2. Cocaine or cocaine metabolite.
> 3. Heroin or heroin metabolite (morphine or monoacetyl morphine).
> 4. Lysergic acid diethylamide.
> 5. Marijuana or marijuana metabolite.

---

[5] A number of states have legalized medicinal marijuana use. Nevada citizens have voted medical marijuana as a right in its state constitution. *See* Art. 4, Sect. 38; *See also* NRS 453A.010 et seq. This Court has recently granted *certiorari* in *Ashcroft v. Angel McClary Raich*, et al. Case No. 03-15481 (Docketed 4/20/04) to decide whether the federal government can prohibit states from legalizing medicinal marijuana use. If States prevail, then Williams' issue is far broader in scope than the singular application in her case. All *unimpaired* marijuana users who drive in Nevada will be prosecuted based on the state supreme court's opinion below.

[6] Nevada has created a *per se* drug driving law. *See* NRS 484.379(3) and NRS 484.3795. *Per se* drugs are those defined as prohibited substances under NRS 484.1245.

6. Methamphetamine.

7. Phencyclidine. (1999, ch. 622 § 20, p. 3414.)

(Emphasis added)

The list of substances in 1 through 7 inclusive only become a prohibited substance ***if*** " . . . the substance is classified in schedule I or II pursuant to NRS 453.166 or 453.176. . . . " The plain reading of NRS 484.1245 holds that marijuana metabolite can be used as a theory of prosecution only if it is listed in the schedules.[7] THE NEVADA SUPREME COURT ADMITTED THAT CARBOXYLIC ACID IS NOT LISTED IN THE SCHEDULES!

> "In this case, although marijuana is listed in schedule I, ***marijuana metabolite, carboxylic acid, is not listed in schedule I or II.***"
>
> Opin., p. 10. (Emphasis added.)

Blatantly ignoring the clear and unambiguous language of NRS 484.1245 and all rules of statutory construction, the state high court held that marijuana metabolite, carboxylic acid " . . . is a prohibited substance." *Id.* at 10. This unforeseeable and retroactive judicial expansion of NRS 484.1245 ignores that Williams "did not violate the statute as it was written. . . . " *Bouie v. City of Columbia*, 378 U.S. 347, 355, 84 S. Ct. 1697, 1703 (1964). The Court in *Rogers*, noted " . . . that the Due Process . . . [clause]

---

[7] The "valid prescription" condition precedent is not at issue here but is relevant. The state high court's erroneous interpretation of NRS 484.1245 authorizes prosecution of legal marijuana users. The lawfulness of marijuana use does not determine what substances will be found in the blood. Valid prescription marijuana users will have the non-active carboxylic acid in their blood.

safeguard[s] ... the interests in fundamental fairness (through notice and fair warning) and the prevention of arbitrary and vindictive use of the laws."[8] *Id.* at 460. The judicial expansion of NRS 484.1245 violates *Griffin v. United States*, supra, and *Leary v. United States*, supra, because carboxylic acid clearly " ... fails to come within the statutory definition of the crime" of NRS 484.3795, as written. *Griffin* at 59. The state district court correctly applied the United States Constitution and granted Williams a new trial. Acting as a judicial legislature in violation of the United States Constitution, the Nevada Supreme Court "*rewrote*" NRS 484.1245 to deny Williams her constitutional right to a new trial.

The plain language of NRS 484.1245 leads to only one honest conclusion, marijuana metabolite is ***not*** a prohibited substance. Williams' *Writ of Certiorari* should be granted.

CONCLUSION

For all the reasons stated above, this Court should grant *certiorari* to address the unforeseeable and retroactive judicial expansion of NRS 484.1245 and its resultant violation of *Griffin v. United States*, supra, and *Leary v. United States*, supra. Williams is constitutionally entitled under the Fourteenth Amendment Due Process Clause of the United States Constitution to a new trial. Accordingly,

[8] The state supreme court's interpretation of NRS 484.1245 is so erroneous it should be declared unconstitutional on a separation of power basis because the judicial branch of government engaged in legislating.

Williams respectfully requests that her *Writ of Certiorari* be granted.

Respectfully submitted,

JOHN G. WATKINS, ESQ.
Counsel of Record
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006

ELLEN J. BEZIAN, ESQ.
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 471-7741

Attorneys for Petitioner

IN THE SUPREME COURT OF THE
STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. JESSICA WILLIAMS, Respondent.	No. 41109

Appeal from an order of the district court granting a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

Reversed.

Brian Sandoval, Attorney General, Carson City; David J. Roger, District Attorney, James Tufteland, Chief Deputy District Attorney, and Gary R. Booker and Bruce W. Nelson, Deputy District Attorneys, Clark County, for Appellant.

Law Office of Ellen J. Bezian and Ellen J. Bezian, Las Vegas; Law Offices of John G. Watkins and John Glenn Watkins, Las Vegas, for Respondent.

BEFORE THE COURT EN BANC.[1]

OPINION

(Filed Jul. 22, 2004)

PER CURIAM:

The State of Nevada appeals from the district court's grant of a post-conviction petition for a writ of habeas corpus to respondent Jessica Williams. The State argued that Williams' petition was procedurally barred since Williams' claim that marijuana metabolite, carboxylic acid, is not a prohibited substance pursuant to NRS 484.379 should have been raised at trial or on direct appeal.

We agree and conclude that the district court erroneously granted Williams' petition. Williams did not establish good cause for failing to raise the claim at trial or on direct appeal. Additionally, Williams was unable to establish actual prejudice because the plain language of NRS 484.379 clearly includes marijuana metabolite as a prohibited substance.

FACTS

A grand jury indicted Jessica Williams on six counts each of driving and/or being in actual physical control of a vehicle while under the influence of a controlled substance and/or with a prohibited substance (marijuana and marijuana metabolite) in the blood or urine, reckless driving, and involuntary manslaughter. In addition, Williams was

[1] The Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter. The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this matter.

indicted on one count each of using or being under the influence of a controlled substance (marijuana and ecstasy), possession of a controlled substance (marijuana), and possession of drug paraphernalia.

Williams was tried, and the jury found her guilty of six counts of driving a vehicle with a prohibited substance in her blood or urine; one count for each of the six deaths that resulted from her conduct. Williams was also convicted of the single counts of unlawfully using a controlled substance and possession of a controlled substance. The jury acquitted Williams of the remaining charges.

On direct appeal, Williams raised several assignments of error regarding the validity of her conviction and the statute under which she was convicted. Discerning no error, we affirmed Williams' judgment of conviction.[2]

Williams timely filed a post-conviction petition for writ of habeas corpus in the district court. Williams alleged that her conviction for driving a vehicle with a prohibited substance in her blood or urine was unconstitutional on the ground that one of the theories presented to the jury was improper; namely, that she was driving with marijuana metabolite in her blood. Williams alleged that the theory was improper because marijuana metabolite, carboxylic acid, is not a prohibited substance under NRS 484.1245. She maintained that under the plain language of NRS 484.1245, in order for carboxylic acid to be a prohibited substance, a prescription must not be issued for its use and it must be classified as a schedule I or II controlled substance pursuant to NRS 453.166 or 453.176.

---

[2] *Williams v. State*, 118 Nev. 536, 554, 50 P.3d 1116, 1127 (2002).

Williams argued that since carboxylic acid is not listed in schedule I or II, it is not a prohibited substance. Therefore, Williams contended that since the jury returned a general verdict of guilty, and it was impossible to determine which theory was used as the basis of her conviction – marijuana or marijuana metabolite – her conviction must be reversed as to those counts.

The State responded that Williams' petition was procedurally barred and should be dismissed pursuant to NRS 34.810. The State further maintained that even if the petition was properly before the district court, it should still be denied because, among other reasons, both NRS 484.1245 and 484.379 specifically provide that it is unlawful to drive with marijuana metabolite in the blood.

The district court conducted an evidentiary hearing, agreed with Williams, and granted her petition. The district court concluded that since carboxylic acid is not listed in schedule I or II, it is not a prohibited substance under NRS 484.1245 or 484.379(3). Accordingly, it was unconstitutional for the State to prosecute Williams for driving a vehicle with marijuana metabolite in her blood or urine. Because Williams was prosecuted on alternative theories under the prohibited substance statute based on marijuana or marijuana metabolite, and the jury returned general verdicts of guilty, it was unknown which theory served as the basis for her conviction. Thus, the district court ordered that Williams' convictions for driving a vehicle with a prohibited substance in the blood or urine be reversed. Implicit in the district court's ruling appears to have been the conclusion that Williams had established a showing of prejudice sufficient to overcome the procedural bar. The State timely filed a notice of appeal.

DISCUSSION

The State argues that Williams' petition was procedurally barred by NRS 34.810. The State maintains that Williams' claim that marijuana metabolite is not a prohibited substance is a new claim that she could have raised at trial or on direct appeal.

NRS 34.810 establishes a procedural bar for new post-conviction claims that could have been raised previously. NRS 34.810(1)(b) provides:

> 1. The court shall dismiss a petition if the court determines that:
>
> . . . .
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> (1) Presented to the trial court;
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
>
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence . . . .

Based on the "shall dismiss" language contained in subsection 1 above, we have noted that application of the procedural bar pursuant to NRS 34.810 is mandatory.[3] However, according to NRS 34.810(1)(b), if the district court finds both cause for the failure to present the grounds and actual prejudice to the petitioner, the district court may

---

[3] *State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003).

consider a petition that is otherwise procedurally barred. Under NRS 34.810(3), the petitioner has the burden of pleading and proving specific facts to demonstrate good cause for the failure to present the claim and actual prejudice.

In the instant case, Williams' claim that marijuana metabolite is not a prohibited substance was not raised in the prior proceedings and is a new claim. Thus, absent a showing of cause and prejudice, Williams' claim was procedurally barred pursuant to NRS 34.810.

To establish good cause for failure to raise a claim in an earlier proceeding, a petitioner must demonstrate that an impediment external to the defense prevented her from raising her claims earlier.[4] "For example, such an impediment might be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available . . . or that some interference by officials made compliance [with the procedural rule] impracticable."[5] "Actual prejudice requires a showing not merely that the errors [complained of] created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions."[6]

We conclude that there is no merit to Williams' allegation of good cause. Williams' assertion that she could not have raised this claim previously because it was indiscernible due

---

[4] *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Pellegrini v. State*, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001).

[5] *Pellegrini*, 117 Nev. at 886-87, 34 P.3d at 537 (internal quotation marks omitted).

[6] *Id.* at 887, 34 P.3d at 537 (internal quotation marks omitted).

to its highly complex, esoteric, and scientific nature does not establish cause. She presented no specific evidence to demonstrate or explain why this issue could not have been raised either at trial or on direct appeal.

Additionally, we conclude that Williams failed to establish actual prejudice sufficient to overcome the procedural bar of NRS 34.810, since marijuana metabolite is a prohibited substance under NRS 484.379 and 484.1245. NRS 484.379 makes it unlawful for a person to drive under the influence of a prohibited substance. NRS 484.379(3) states that "[i]t is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than" specified amounts of ten listed substances. This subsection then lists ten substances that are prohibited and the amount of each substance when found in the blood or urine that constitutes a violation of the statute. Specifically, NRS 484.379(3)(h) states:

Prohibited substance	Urine Nanograms per milliliter	Blood Nanograms per milliliter
. . .		
(h) Marijuana metabolite	15	5

Thus, the plain language of NRS 484.379 clearly lists marijuana metabolite as a prohibited substance and gives the amount in nanograms per milliliter that must be present in the blood or urine to constitute a violation of the statute.

NRS 484.3795 is part of the same statutory scheme and provides for a penalty enhancement for driving under the influence of a prohibited substance when death or substantial bodily harm results. NRS 484.3795(1)(f) provides:

> 1. A person who:
>
> . . .
>
> (f) Has a prohibited substance in his blood or urine in an amount that is equal to or greater than the amount set forth in subsection 3 of NRS 484.379,
>
> and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this state, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, a person other than himself, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and must be further punished by a fine of not less than $2,000 nor more than $5,000.

This provision incorporates by reference NRS 484.379, which specifically lists marijuana metabolite as a prohibited substance. Thus, the enhanced penalties of NRS 484.3795 apply to any person who has a proscribed amount of marijuana metabolite in her blood or urine under NRS 484.379.

Despite the fact that marijuana metabolite is a prohibited substance under these statutory provisions, Williams claims that marijuana metabolite is not a prohibited

substance. Williams bases her argument on another statutory provision, NRS 484.1245.

NRS 484.1245 is also part of the same statutory scheme as NRS 484.379 and 484.3795, and it defines "prohibited substance." NRS 484.1245 reads as follows:

> "Prohibited substance" means any of the following substances if the person who uses the substance has not been issued a valid prescription to use the substance and the substance is classified in schedule I or II pursuant to NRS 453.166 or 453.176 when it is used:
>
> 1. Amphetamine.
>
> 2. Cocaine or cocaine metabolite.
>
> 3. Heroin or heroin metabolite (morphine or 6-monoacetyl morphine).
>
> 4. Lysergic acid diethylamide.
>
> 5. Marijuana or marijuana metabolite.
>
> 6. Methamphetamine.
>
> 7. Phencyclidine.

Marijuana metabolite is listed as a prohibited substance at item five. However, according to the statute, the listed substances become prohibited substances if also classified in schedule I or II pursuant to NRS 453.166 or 453.176.

Pursuant to NRS 453.166 and 453.176, the Pharmacy Board is authorized to schedule substances. Delineating the qualifications for a drug classified in schedule I, NRS 453.166 authorizes the board to place a substance in schedule I if the board finds that the substance "1. [h]as high potential for abuse; and 2.[h]as no accepted medical

use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." NRS 453.176 provides that the board is authorized to place a substance in schedule II if it finds "1. [t]he substance has high potential for abuse; 2. [t]he substance has accepted medical use in treatment in the United States, or accepted medical use with severe restrictions; and 3.[t]he abuse of the substance may lead to severe psychological or physical dependence." Schedule I is codified at NAC 453.510, and schedule II is codified at NAC 453.520.

In this case, although marijuana is listed in schedule I, marijuana metabolite, carboxylic acid, is not listed in schedule I or II. While marijuana metabolite is not listed on either schedule, it is clear from the plain language of both NRS 484.379 and 484.1245 that marijuana metabolite is a prohibited substance.

Additionally, even if we agreed with Williams' position that the failure to list marijuana metabolite on the schedules creates an ambiguity as to whether marijuana metabolite is a prohibited substance under the statutory provision, she still would be unable to establish prejudice. NRS 484.1245, 484.379(3), and 484.3795(1)(f) are all additions to Chapter 484, arising from Senate Bill 481 during the 70th Session of the Nevada Legislature. The starting point for the Legislature in drafting the prohibited substance sections of NRS 484.1245 and 484.379(3) was a list of drugs contained and identified as "controlled substances" in NRS 484.385(5), governing license revocation. The list of drugs contained twenty-one substances, many of which were listed by their scientific names.

Marijuana and marijuana metabolite were notably missing from this list.[7]

During a subsequent Senate Judiciary Committee meeting, it was noted that a determination had been made to list all controlled substances that are illegal to consume, with the specific addition of marijuana.[8] On April 9, 1999, a new list of controlled substances was presented to the committee.[9] It was noted that if any of the substances in the list were found in the system of a person operating a motor vehicle, it would be a per se violation.[10]

Eventually the Assembly Judiciary Committee considered the bill and heard testimony similar to that presented to the Senate.[11] The Assembly, responding to the expressed view that having a specific standard for measuring the substances listed would be more defensible than simply looking for "detectable amounts" of each substance, amended the list once again.[12] Cocaine metabolite, heroine metabolite, morphine, 6-monoacetyl morphine, and marijuana metabolite were added to the list because there was a standard for detecting these substances in the blood.[13]

---

[7] Hearing on S.B. 481 Before the Senate Comm. on Judiciary, 70th Leg. (Nev., April 2, 1999).

[8] Hearing on S.B. 481 Before the Senate Comm. on Judiciary, 70th Leg. (Nev., April 7, 1999).

[9] Hearing on S.B. 481 Before the Senate Comm. on Judiciary, 70th Leg. (Nev., April 9, 1999).

[10] *Id.*

[11] Hearing on S.B. 481 Before the Assembly Comm. on Judiciary, 70th Leg. (Nev., May 5, 1999).

[12] *Id.*

[13] Hearing on S.B. 481 Before the Assembly Comm. on Judiciary, 70th Leg. (Nev., May 12, 1999).

Mecloqualone and methaqualone, which were previously on the list, were stricken since there was no standard for detecting them in the blood.[14]

Thus, despite Williams' attempt to establish prejudice by statutory ambiguity, it is clear that in passing the prohibited substance statute, the Legislature intended to specifically list marijuana metabolite as a prohibited substance under NRS 484.1245 and 484.379(3), and to incorporate it by reference under NRS 484.3795(1)(f).

Finally, because Williams fails to show any error creating actual prejudice, we need not consider her claim on the basis that failure to do so would result in a fundamental miscarriage of justice.

Accordingly, we conclude that Williams failed to show good cause and actual prejudice to excuse the procedural bar to her post-conviction habeas petition or to show that a fundamental miscarriage of justice would occur from the failure to consider her claim for relief. Thus, we determine that the district court erred in granting Williams' post-conviction petition.

CONCLUSION

We conclude that Williams' post-conviction petition was procedurally barred, and we reverse the district court's order granting her petition for a writ of habeas corpus.

---

[14] *Id.*

/s/ Shearing, C.J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Rose, J.
Rose

/s/ Becker, J.
Becker

/s/ Maupin, J.
Maupin

ATTEST: A FULL, TRUE AND CORRECT COPY.

CLERK OF THE SUPREME COURT
By /s/ A. Alvarado
Deputy Clerk

ORD
JOHN G. WATKINS, ESQ.
Nevada Bar No. 1574
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006

ELLEN J. BEZIAN, ESQ.
Nevada Bar No. 6225
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 471-7741

DISTRICT COURT
CLARK COUNTY, NEVADA

JESSICA WILLIAMS, Petitioner,	)	
vs.	)	CASE NO.: C189090
	)	DEPT. NO.: XI
STATE OF NEVADA, Respondent.	)	

ORDER GRANTING WRIT OF HABEAS CORPUS (POST CONVICTION); FINDING OF FACTS AND CONCLUSIONS OF LAW

(Filed Mar. 3, 2003)

PETITIONER'S Writ of Habeas Corpus (Post Conviction) having come on for hearing February 11, 2003 at 9:00 AM and continued to February 25, 2003, at the hour of 10:30 AM, this Court, having read the submitted briefs and heard oral arguments, Good Cause appearing:

THE COURT FINDS that the State prosecuted Petitioner Williams on two alternative theories under

the "prohibited substance" section of NRS 484.3795: 1. Marijuana (Tetrahydrocannabinol) and 2. Marijuana metabolite (Carboxylic Acid.) The Jury returned general verdicts of guilty, thus it is unknown which theory, tetrahydrocannabinol or carboxylic acid, was used as a basis for Petitioner Williams' convictions.

THE COURT FURTHER FINDS that the Board of Pharmacy has classified other metabolites by specifically listing them in the Schedules. (For example, the metabolite of cocaine is Benzolyecgonine and it is listed in Schedule II, subpart 2(b).)

THE COURT FURTHER FINDS that the Board of Pharmacy does not list carboxylic acid in Schedule I (NAC 453.510) or Schedule II (NAC 453.520). Also, the State conceded that carboxylic acid was not specifically listed in the Drug Schedules.

THE COURT FURTHER FINDS that tetrahydrocannabinol is listed in Schedule I, thus according to NRS 484.1245 tetrahydrocannabinol is a "prohibited substance." The marijuana metabolite, carboxylic acid is not listed in Schedule I or II; therefore, carboxylic acid is not a "prohibited substance" under NRS 484.1245 or NRS 484.379(3).

CONCLUSIONS OF LAW

THE COURT HOLDS that "No conduct constitutes a crime unless prohibited by some statute of this state. . . ." NRS 193.050(1).

THE COURT FURTHER HOLDS that it is unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution for

the State to use lawful conduct as a basis to convict. When a case has been submitted to a jury on alternative theories and one of the theories is unconstitutional, the verdict must be set aside. *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466 (1991); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532 (1969). The State does not challenge the holdings of *Griffin* and *Leary*.

THE COURT FURTHER HOLDS that carboxylic acid, a marijuana metabolite, is not listed in Schedule I or II; therefore, carboxylic acid is not a prohibited substance as defined in NRS 484.1245.

THE COURT FURTHER HOLDS that since carboxylic acid is not classified in Schedule I or II, it does not come within the definition of a "prohibited substance," thus its use was an unconstitutional theory of prosecution. *See Griffin* at 59 (" . . . or fails to come within the statutory definition of the crime.")

THE COURT FURTHER HOLDS that the definition of marijuana set forth in NRS 453.096 cannot be used to bootstrap carboxylic acid into becoming a "prohibited substance" under NRS 484.1245 for several reasons. The definition of a controlled substance must be contained in the Schedule itself. The Court said in *Sheriff, Clark County v. Lugman*, 101 Nev. 149, 697 P.2d 107 (1985), "Therefore, it is apparent when reading the UCSA that if one desires to determine whether a particular drug is defined as a controlled substance, he or she **need only check the pharmacy board regulations**." (emphasis added.) *Id.* at 156. A review of Schedule I shows that marijuana metabolite is not defined. *See again, Lugman, supra*. Further, the word "derivative" used in NRS 453.096 is contradictory. Carboxylic acid would be illegal under

Section 1 of NRS 453.096 and not illegal under Section 2 of NRS 453.096. Contradictions must be construed in favor of the Petitioner. *Lugman*, *supra*, said, "It is basic to the principles of the due process clause of the fourteenth amendment that an individual may not be held 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Id.* at 155.

THE COURT FURTHER HOLDS that since the word "marijuana" as listed in Schedule I is not properly defined, its meaning as to a particular substance is pure guesswork, Such speculation does not satisfy the constitutional requirement of notice under the Sixth and Fourteenth Amendments of the United States Constitution. The Court in *Whitney v. State, Employment Security Dep't*, 105 Nev. 810, 813, 783 P.2d 459 (1989) said,

> In addition, Whitney could not be considered "self-employed," **because self-employment is undefined**. Basic concepts of fairness and due process require that one who is charged with a wrongdoing be put on notice as to what conduct constitutes the wrong. U.S. Const. amend. XIV; Nev. Const. art. I, § 8; Eaves v. Bd. of Clark County Comm'rs, 96 Nev. 921, 923, 620 P.2d 1248, 1249-50 (1980). (emphasis added.)

THE COURT FURTHER HOLDS that since the case was submitted to the Jury on alternative theories, one theory, carboxylic acid, being unconstitutional, *Griffin* and *Leary* mandates [sic] reversal.

THE COURT ORDERS that the conviction under Counts I through VI inclusive of the Indictment, Case NO. C166483, are reversed.

DATED this 3 day of March, 2003.

/s/ Michael Douglas
DISTRICT COURT
JUDGE

/s/ John G. Watkins
JOHN G. WATKINS,
ESQ.
Nevada Bar No. 1574
804 S. Sixth Street
Las Vegas, Nevada
89101
(702) 383-1006
Co-Counsel for
JESSICA WILLIAMS

/s/ Ellen J. Bezian
ELLEN J. BEZIAN,
ESQ.
Nevada Bar No. 6225
804 S. Sixth Street
Las Vegas, Nevada
89101
(702) 471-7741
Co-Counsel for
JESSICA WILLIAMS

484.1245. "Prohibited substance" defined.

"Prohibited substance" means any of the following substances if the person who uses the substance has not been issued a valid prescription to use the substance and the substance is classified in schedule I or II pursuant to NRS 453.166 or 453.176 when it is used:

1. Amphetamine.
2. Cocaine or cocaine metabolite.
3. Heroin or heroin metabolite (morphine or 6-monoacetyl morphine).
4. Lysergic acid diethylamide.
5. Marijuana or marijuana metabolite.
6. Methamphetamine.
7. Phencyclidine.

Nevada Revised Statutes

484.379. Driving under the influence of intoxicating liquor or controlled or prohibited substance: Unlawful acts; affirmative defense.

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his blood or breath; or

(c) Is found my measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who:

(a) Is under the influence of a controlled substance;

(b) Is under the combined influence of intoxicating liquor and a controlled substance; or

(c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

3. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than:

	Prohibited substance	Urine Nanograms per milliliter	Blood Nanograms per milliliter
(a)	Amphetamine	500	100
(b)	Cocaine	150	50
(c)	Cocaine metabolite	150	50
(d)	Heroin	2,000	50
(e)	Heroin metabolite:		
	(1) Morphine	2,000	50

	(2) 6-monoacetyl morphine	10	10
(f)	Lysergic acid diethylamide	25	10
(g)	Marihuana	10	2
(h)	Marihuana metabolite	15	5
(i)	Methamphetamine	500	100
(j)	Phencyclidine	25	10

4. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

484.3795. Driving under the influence of intoxicating liquor or controlled or prohibited substance: Penalty if death or substantial bodily harm results; segregation of offender; plea bargaining prohibited; affirmative defense; aggravating factor.

1. A person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his blood or breath;

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath;

(d) Is under the influence of a controlled substance or is under the combined influence of intoxicating liquor and a controlled substance;

(e) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle; or

(f) Has a prohibited substance in his blood or urine in an amount that is equal to or greater than the amount set forth in subsection 3 of NRS 484.379, and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this state, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, a person other than himself, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and must be further punished by a fine of not less than $2,000 nor more than $5,000. A person so imprisoned must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.

2. A prosecuting attorney shall not dismiss a charge of violating the provisions of subsection 1 in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to

a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial. A sentence imposed pursuant to subsection 1 may not be suspended nor may probation be granted.

3. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

4. If the defendant was transporting a person who is less than 15 years of age in the motor vehicle at the time of the violation, the court shall consider that fact as an aggravating factor in determining the sentence of the defendant.